OSHA and "MUST-CITE" MANDATES

Introduction

Many bills introduced in the House and Senate during the 105th Congress sought to amend the Occupational Safety and Health Act of 1970 (OSH Act).[1] Reading these bills together, it is clear that Congress intends to shift the Occupational Safety and Health Administration (OSHA) away from its traditional emphasis on inspection and citation and to reposition the agency instead as a resource for training, consultation and technical assistance.

This section will address Section 9(a) of the OSH Act,[2] which contains must-cite language that has historically been interpreted to be at odds with these objectives. The American Worker Project joins with the Senate sponsors of the OSHA Modernization Act of 1997[3] and the SAFE Act[4] in urging amendments to Section 9 (a) that would permanently allow consultation and cooperation by explicitly providing the Secretary with the discretion to choose which violations observed during an inspection will be subject to citation. We are indebted to the Solicitor of Labor for the comprehensive review of this subject provided in the June 2, 1995, memorandum, "OSHA's Enforcement Discretion: A Review of the 'Must-cite' Principle," which is attached as Appendix 6.

OSH Act Section 9(a)

OSH Act Section 9 is entitled "Citations." Section 9(a) addresses "[a]uthority to issue; grounds; contents; notice in lieu of citation for de minimis violations" and reads:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of Section 5 of this Act, of any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this act, he *shall* with reasonable promptness issue a citation to the employer . . . The Secretary *may* prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health. (emphasis added)

As will be fully discussed below, OSHA's historical position has been that by using the word "shall," Congress created a "must-cite" rule for every instance in which "the Secretary or his authorized representative believes that an employer has violated a requirement of . . . this Act." Indeed, the regulations that OSHA developed under this Section strongly reinforced this position.[5] While the Secretary now claims to have found some discretion in this section, a panel of the United States Court of Appeals for the First Circuit Court of Appeals recently read the word "shall" in the first sentence of Section 9(a) as an indication that Congress did not intend for OSHA to have discretionary functions once it enters an employer's premises.[6]

While OSHA's most recent interpretation of 9(a) has been flexible in its approach to the workplace, there is nothing keeping them from reverting to the restrictive interpretation.

Some Policy-Driven Deviations from the "Must-Cite" Principle

From the beginning, OSHA construed the word "shall" to eliminate any discretion and to require citation. In correspondence and in testimony, OSHA has repeatedly stated that entering an employer's premises constitutes an inspection, requiring citations for any observed violation. Despite this position, OSHA has allowed itself a number of "policy" exceptions to the must-cite rule over the years. For instance, OSHA has always taken the position that personnel engaged in gathering information for the development of standards or evaluating requests for variances may visit workplaces without issuing citations. While the Act does give OSHA specific authority to gather information for these purposes,[7] it does not specifically exempt personnel visiting workplaces in the course of these functions from the must-cite language of Section 9(a).

In 1972, the agency decided that states operating their own OSHA plans would not be bound by the must-cite language.[8] In 1974, OSHA built on this idea by establishing a consultation program for federal OSHA states that provides for on-site consultation by state personnel at federal OSHA's expense.[9] With the publication of Voluntary Protection Program (VPP) guidelines in 1982, OSHA allowed itself a more direct exception from the must-cite language of Section 9(a).[10] After OSHA reviews an applicant's reports and operating procedures, federal OSHA personnel conduct an on-site safety program evaluation and document review. No citations are issued as a result of these "site walkthroughs" even though violations may be observed. If accepted into the program, the site is removed from OSHA's general schedule inspection list.

Another program that runs afoul of OSHA's citation mandate is the Cooperative Assessment Program (CAP), which was developed by OSHA in 1983 to provide compliance assistance to certain employers subject to OSHA's lead standard. Companies participating in the program agreed to an abatement plan that would be monitored by OSHA. In exchange, OSHA agreed not to issue citations for violations of the lead standard it observed so long as the employer was following the abatement plan. OSHA has also entered into numerous Corporate-wide Settlement Agreements by which an employer agrees to abate safety and health hazards at facilities other than one that OSHA originally inspected. The employer also agrees to allow OSHA access to these facilities to monitor compliance with the agreement. In exchange, OSHA agrees not to issue citations for violations covered by the agreement as long as the employer is generally complying with the abatement plan.

The Maine 200 Program and the Cooperative Compliance Program (CCP) instruction (recently struck down in court because of OSHA's failure to follow the rulemaking process)[11] also contain provisions that are at odds with the must-cite language of Section 9(a). Under these programs, OSHA focuses its resources on employers with high injury and illness rates. By accepting OSHA's offer to participate, an employer can reduce the chance of a safety and health inspection from 100 percent to 30 percent. The employer agrees to establish a safety and health program, to find and fix hazards, work toward reducing injuries and illnesses, and fully involve employees in their safety and health program. Though program sites are subject to monitoring inspections by OSHA personnel, OSHA agrees not to issue citations so long as the employer is taking adequate measures to abate hazards. As with all of the above programs, there is merit to the CCP especially in the concept of concentrating OSHA's resources where they are needed

most. As with all of the above programs, OSHA's agreement not to issue citations is also at odds with a strict interpretation of the must-cite language of Section 9(a) and the accompanying regulations.

American Worker Project Approach

The American Worker Project fully agrees with Congress' efforts to move OSHA toward programs that offer employers consultation on a cooperative and voluntary basis without citation and penalty assessment. Based upon the programs outlined above and the agency's own statements, it would seem that OSHA basically agrees with these efforts. With this in mind, Chairman Hoekstra, in a letter dated October 9, 1997, asked OSHA if the agency would oppose a change in the language of Section 9(a) to replace the word "shall" in the first sentence of Section 9(a) with the word "may." With this change, the first sentence would end with the words " . . . *may* with reasonable promptness issue a citation to the employer." (emphasis added). This change would make it indisputable that OSHA does in fact have the discretion to decide for itself, as a matter of policy, which violations must be cited and which can instead become the subject of some alternative form of enforcement such as consultation that is both cooperative and voluntary.[12] A similar, if more complex, change to Section 9(a) was proposed by Senator Gregg as Section 7 of the OSHA Modernization Act of 1997 (S.551) and by Senator Enzi as Section 15 of the SAFE Act (S.1237).[13]

In response, OSHA's Acting Assistant Secretary Gregory Watchman rejected Chairman Hoekstra's offer of legislative assistance on the grounds that OSHA already has the citation discretion it needs to operate these programs:

> The Department shares your concern that the wording of Section 9(a) of the OSH Act, 29 U.S.C. § 660 (a) [sic], may limit OSHA's discretion to establish it's Cooperative Compliance Program or other similar initiatives. However we do not believe that any such impediment exists. As a general matter, federal case law demonstrates that OSHA possesses sufficient prosecutorial discretion to implement cooperative assistance programs of this type. OSHA has used this discretion extensively in the past, developing initiatives such as the well-regarded Maine 200 and voluntary protection programs (VPP).
>
> For this reason we do not believe that amending Section 9 (a) to read that the Secretary "may issue a citation," is necessary to preserve OSHA's ability to develop innovative and effective compliance strategies. Conversely, we believe that such a change, even though intended to codify existing law, could be damaging. A few employers could well take the change as a signal that they need not take the preventative steps the Act requires to protect employees against hazardous conditions, or that they could decide for themselves that certain hazards need not be abated. This result would not only endanger the employees of those employers; it would also place employers who comply in good faith with the Act and standards at a relative disadvantage.

On March 19, 1998, project staff conducted an interview of Emzell Blanton, OSHA's Deputy Assistant Secretary, regarding OSHA's Cooperative Compliance Programs (CCP). During the course of this interview and the accompanying slide presentation, Mr. Blanton acknowledged that the CCP depends, at least in part, on OSHA having the discretion not to issue citations for violations observed by its personnel during monitoring inspections. It was also learned that the Solicitor of Labor had prepared one or more legal memoranda in support of an interpretation of OSH Act Section 9(a) that would give OSHA this discretion. Though the American Worker Project requested copies of all such legal memoranda prepared by the Solicitor, OSHA's initial response was to provide copies of its prior responses on this issue to Senator Jeffords and Congressman Istook. OSHA's response to Congressman Istook actually cited "attorney-client privilege" as a basis on which the agency could decline to produce the Solicitor's work product on this issue for Congress. Chairman Hoekstra immediately renewed his request for all such memoranda prepared by the Solicitor, refuting in advance any claim of attorney-client privilege OSHA might make.[14] OSHA then produced the Solicitor of Labor's comprehensive memorandum of June 2, 1995, titled "OSHA's Enforcement Discretion: A Review of the 'Must-cite' Principle" that is attached as Appendix 6.

The Solicitor of Labor's June 2, 1995 Memorandum

This memorandum was prepared by then Solicitor of Labor Thomas S. Williamson, Jr. to respond to the concerns of then Assistant Secretary for OSHA Joseph Dear that OSHA might not have the citation discretion necessary to support cooperative programs. The memorandum provides an extensive review of the structure and the legislative history of the OSH Act and OSHA's various interpretations and policy positions over the years. The memorandum then reviews a number of non-OSHA cases, placing great emphasis on *Heckler v. Chaney*, a Supreme Court case from 1985.[15] In *Heckler*, the Supreme Court explained that, without clear statutory standards against which its decisions can be measured, an agency's decision not to take a particular enforcement action is generally within the agency's absolute discretion.[16] The problem for OSHA, of course, is that the language of Section 9(a), as reinforced by regulations OSHA itself promulgated, appears to establish a very clear must-cite standard.

The Irving Case

The strained conclusions of the Solicitor's June 2, 1995, memorandum were sharply contradicted by the April 8, 1998, majority opinion of the First Circuit Court of Appeals in *Irving v. U.S.* (known as *Irving III*).[17]

Gail Irving was severely injured at the New Hampshire shoe company where she worked on October 10, 1979. The injury occurred as she bent over to pick up a glove and her hair became entangled in the unguarded rotating shaft of a nearby machine. Prior to the date of this accident, OSHA compliance officers had twice inspected the premises of this shoe company but had failed to notice this unguarded rotating shaft. As a result, OSHA had not issued citations for this hazardous condition.

Irving brought suit against the government, claiming that OSHA had negligently breached its legal duty to her to properly inspect and issue citations for this unguarded shaft, and that this breach was the cause of her injuries. In its defense, the government argued that Irving's claim was barred by the so-called discretionary function exception. This would relieve the government of responsibility on the theory that these OSHA compliance officers were not mandated to conduct complete inspections, but that the law instead allowed them the discretion to limit the scope of the inspections.

Even in this day of prolonged litigation, the *Irving* case has suffered an especially tortured course. Since suit was filed in October of 1981, the case has been to the First Circuit Court of Appeals five times.[18] The trial court first dismissed the Irving case in January of 1988, saying that discretionary function exception did in fact apply; however, the Court of Appeals repeatedly found reason to disagree with this conclusion. On April 8, 1998, the Court of Appeals issued the comprehensive *Irving III* opinion, in which it concluded that these OSHA personnel had no discretionary function as to the scope of these inspections once they entered Ms. Irving's place of work. In concluding that OSHA had no discretion to limit these inspections once its compliance officers entered the factory, the *Irving III* court relied in part on the use of the word "shall," not only in Section 9(a) but in the regulations that OSHA itself promulgated under that Section.[19]

Findings and Recommendations

Reading the plain language of Section 9(a) and its accompanying regulations, especially in light of the recent appeals court analysis provided in *Irving v. U.S.*, there is serious concern about OSHA's ability to utilize citation discretion in the OSH Act as it is currently written. Regardless, without clarification of the Act to specifically allow Department of Labor's discretion on enforcement, the possibility of reverting to a strict interpretation exists.

- If Congress now believes that OSHA should have the discretion to decide for itself what violations will be cited, then Congress should proceed with its efforts to replace the must-cite language of Section 9(a) with language that will clearly enable cooperation between OSHA and the industries it regulates. This will help to ensure permanent progress toward a "New OSHA."

---

[1] 29 U.S.C. § 658(a).
[2] S. 551, 105th Cong., 1st Sess. (1997).
[3] S. 1237 supra.
[4] 29 C.F.R. § 1903.14(a), which reads "[t]he Area Director shall review the inspection report of the Compliance Safety and Health Officer. If, on the basis of the report the Area Director believes that the employer has violated a requirement of Section 5 of the Act, of any standard, rule or order promulgated pursuant to Section 6 of the Act, or of any substantive rule published in this chapter, he shall, if appropriate, consult with the Regional Solicitor, and he *shall* issue to the employer either a citation or a notice of de minimis violations which have no direct or immediate relationship to safety or health" (emphasis added).
[5] Irving v. U.S., No. 96-2368, 96-2369, 1998 WL 152941, at 5-6 (1st Cir. (N.H.) Apr. 8, 1998). *But see* Irving v. U.S., F.3d (1st Cir. 1998), No. 96-2368, WL 869672 (1st Cir.(N.H.) Dec. 18, 1998), which reverses this decision without commenting on the must-cite language in Section 9(a) and the regulations

[6] 29 U.S.C. §§ 655(b)(1) and (d).
[7] 29 U.S.C. §§ 667(c)(2).
[8] 29 C.F.R., Part 1908. The authority for these regulations was codified during the 105th Congress by H.R. 2864, which was signed by the President as Public Law No: 105-197 on July 16, 1998.
[9] 47 Fed. Reg. 21025 (July 2, 1982).
[10] CPL 2-0.119. By order dated Feb. 17, 1998, the Court of Appeals for the D.C. Circuit stayed the enforcement of the CCP pending its review. U.S. Chamber of Commerce, et. al. v. Occupational Safety & Health Administration, No. 98-1036 (DC Cir. 1998).
[11] It should be noted that Congress did use the word "may" in the final sentence of Section 9(a) in an apparent to make it clear that it intended for OSHA to have discretion regarding citation of so called de minimis violations.
[12] SEC. 7. WARNINGS IN LIEU OF CITATIONS.
Subsection (a) of Section 9 (29 U.S.C. 658(a)) is amended to read as follows:
`(a)(1) Except as provided in paragraph (2), if, upon an inspection or investigation, the Secretary or an authorized representative of the Secretary believes that an employer has violated a requirement of Section 5, of any regulation, rule, or order promulgated pursuant to Section 6, or of any regulations prescribed pursuant to this Act, the Secretary *may* with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of an violation, including a reference to the provision of the Act, regulation, rule, or order alleged to have been violated. The citation shall fix a reasonable time for the abatement of the violation.
(2) The Secretary or the authorized representative of the Secretary--
(A) *may* issue a warning in lieu of a citation with respect to a violation that has no significant relationship to employee safety or health; and
(B) *may* issue a warning in lieu of a citation in cases in which an employer in good faith acts promptly to abate a violation if the violation is not a willful or repeated violation.
(3) Nothing in this Act shall be construed as prohibiting the Secretary or the authorized representative of the Secretary from providing technical or compliance assistance to an employer in correcting a violation discovered during an inspection or investigation under this Act without issuing a citation.
[13] Citing *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert. denied 117 S.Ct. 2487 (1997)(claims of attorney-client privilege and work product privilege denied); *In re Sealed Case*, 116 F.3d 550, *reissued in unredacted form*, 121 F.3d 729 (D.C. Cir. 1997)(claims of executive privilege rejected); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997)(claims of attorney-client privilege and work product privilege denied).
[14] 470 U.S. 821 (1985).
[15] Id. at 831.
[16] Irving v. U.S., No. 96-2368, 96-2369, 1998 WL 152941, at 5-6 (1st Cir. (N.H.) Apr. 8, 1998).
[17] See Irving v. United States, 876 F.2d 606 (1st Cir. 1988)(unpublished order); Irving I, 909 F.2d 598 (1st Cir. 1990); Irving II, 49 F.3d 830 (1st Cir. 1995); Irving III, No. 96-2368, 96-2369, 1998 WL 152941 (1st Cir.(N.H.) Apr. 8, 1998); and Irving IV, F.3d (1st Cir. 1998), No. 96-2368, WL 869672 (1st Cir.(N.H.) Dec. 18, 1998).
[18] Irving v. U.S., No. 96-2368, 96-2369, 1998 WL 152941, at 5-6 (1st Cir.(N.H.) Apr. 8, 1998).